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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No. 906

MATSON NAVIGATION COMPANY,
Petitioner,

v.

PACIFIC FAR EAST LINE, INC., UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, MARITIME ADMINISTRATION, CLARENCE G. MORSE, MARITIME ADMINISTRATOR AND FREDERICK H. MUELLER, SECRETARY OF COMMERCE,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Matson Navigation Company, a California corporation (hereinafter referred to as Matson), an appellee in the court below, prays that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the District of Columbia Circuit entered February 4, 1960, vacating the judgment of the District Court. A petition for a writ of certiorari to review the same judgment of the Court of Appeals has been filed in this Court by the Federal Maritime Board, the Maritime

Administration, the Maritime Administrator and the Secretary of Commerce, also appellees below.[1]

Opinion Below

The opinion of the Court of Appeals (R. 674-79),[2] which has not yet been reported, is attached as Appendix A.

Jurisdiction

The judgment of the Court of Appeals, entered February 4, 1960 (R. 680), is attached as Appendix B. The jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code, 28 U.S.C. 1254(1), 62 Stat. 928. This petition is timely under Section 2101(c) of the Judicial Code, 28 U.S.C. 2101(c), 62 Stat. 962, as amended, 63 Stat. 104. Reliance is also placed upon Section 10 of the Act of December 29, 1950, 5 U.S.C. 1040, 64 Stat. 1132, to the extent that such section may be deemed applicable.

Questions Presented

1. Whether the District Court had jurisdiction to review a determination of the Federal Maritime Board and Maritime Administration (hereinafter collectively referred to as the Board) denying Pacific Far East Line, Inc. (hereinafter called PFEL), a subsidized steamship company operating in foreign trade, permission under Section 805(a) of the Merchant Marine Act, 1936, as amended (hereinafter called the Act), to operate in the domestic trade between California and Hawaii.

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[1] A certified copy of the record in the United States Court of Appeals for the District of Columbia Circuit has been filed with the Clerk of this Court.

[2] The reference R. is to the record which contains the opinion of the Court of Appeals. The references J.A. and J.A.S. are to the records before the Court of Appeals, namely, the Joint Appendix and Joint Appendix Supplement, respectively.

2. Whether, if the District Court had jurisdiction to review a determination of this character, Section 31 of the Shipping Act, 1916, as amended, and the provisions of the Judicial Code therein referred to, required the case to be heard before a district court of three judges.

3. Whether the Court of Appeals, in substituting its own interpretation of Section 805(a) for that of the Board and in appraising the Board's factual findings in the light of its own interpretation, (a) failed to accord to the Board's interpretation and application of the statute the weight to which they are entitled, and in the course of so doing (b) improperly countenanced the intervention in the proceedings of the Department of Justice to seek reversal of the Board's determination, after that Department had failed to appear and present its views before the Board.

4. Whether the decision of the Court of Appeals should be reversed because of its failure to require dismissal of the proceedings for lack of jurisdiction or, in the alternative, to affirm the judgment of the District Court.

Statutes Involved

Pertinent provisions of the Shipping Act, 1916, the Judicial Code and the Merchant Marine Act, 1936, are attached as Appendix C.

Statement of the Case

A. *The Proceedings Below*

The present action was brought by PFEL in the United States District Court for the District of Columbia to obtain judicial review of a determination by the Board denying PFEL permission to engage in the domestic, California-Hawaii trade pursuant to Section 805(a) of the Act. (J.A.S. 1-10.) The District Court entered judgment for defendants (J.A.S. 35-36), but the Court of Appeals

reversed, remanding the case for further proceedings before the Board limited to a specified issue, under the circumstances hereafter outlined (R. 679-80).

The proceedings before the Board under review were initiated upon the application of PFEL (J.A. 2). As a subsidized steamship line in the foreign commerce of the United States, PFEL is prohibited from engaging in domestic commerce, such as commerce between the West Coast of the United States and Hawaii, absent the written permission of the Board under Section 805(a). By this statutory provision, the Board is commanded not to grant any application for such permission if it finds that the proposed operations pursuant to the application "will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service [including the West Coast-Hawaii trade] or that it would be prejudicial to the objects and policy of this Act", except in the case of an applicant who has so-called "grandfather rights" (which are not involved as to PFEL). Matson, which for more than 75 years has been engaged as a steamship operator in the West Coast-Hawaii trade, intervened before the Board and has henceforth participated in all of the proceedings before the Board and in the courts.

After a lengthy hearing, extensive briefing and oral argument, the Board denied PFEL's application to engage in the California-Hawaii trade. In reaching this determination, the Board relied upon its several prior decisions interpreting and applying Section 805(a). (J.A. 14.) Based upon numerous subsidiary findings, the Board determined that Matson maintains an adequate service, at only a modest profit; that it has the capacity to carry the cargo available to it; and that the diversion of the volume of cargo which PFEL would carry if its application were granted would seriously jeopardize Matson's replacement

program and impede the proper development and continuation of Matson's California-Hawaii service (J.A. 13-18.) The Board concluded that to grant PFEL's application would result in unfair competition to Matson and would also be prejudicial to the objects and policy of the Act. (J.A. 18.)

Following the Board's determination, which was served May 14, 1957, PFEL filed a petition for review directly with the Court of Appeals, relying upon the Act of December 29, 1950, 5 U.S.C. 1031, 64 Stat. 1129, as amended. At the same time, PFEL filed its complaint in the District Court in the present proceedings. The Court of Appeals, on PFEL's petition for direct review by that court, dismissed the case for lack of jurisdiction, holding that the Act of December 29, 1950, was inapplicable to the review of actions by the Board under Section 805(a) of the Act. *Pacific Far East Line, Inc.* v. *United States and Federal Maritime Board, et al.*, 225 F. 2d 182. Certiorari was thereafter denied by this Court, 358 U.S. 866.

Following the dismissal of its petition to the Court of Appeals, PFEL proceeded with its suit in the District Court. PFEL filed a motion for summary judgment, the Board filed a motion to dismiss or for summary judgment, and Matson filed a motion for judgment on the pleadings or for summary judgment. (J.A.S. 28-34.) Both the Board and Matson contended, among other matters, that the Board's determination by its nature was not subject to judicial review; Matson also suggested that if the matter were subject to judicial review, the case should be heard by a three-judge district court pursuant to Section 31 of the Shipping Act, 1916, as amended. Thereafter, the United States, represented by the Department of Justice, filed a motion to intervene, contending that the Board had erroneously interpreted Section 805(a) of the Act, and that the case should be remanded to the Board. (J.A.S. 22-23,

25-26.) Over the objection of Matson (J.A.S. 23-24), the Department of Justice was permitted to intervene (J.A.S. 25). The Court then granted the motions of the Board and Matson for summary judgment (J.A.S. 35-36).

Both PFEL and the United States, represented by the Department of Justice, appealed to the Court of Appeals (J.A.S. 37), with the Board and Matson as appellees. The Court of Appeals held that the District Court had jurisdiction, that the Board had misinterpreted Section 805(a) of the Act, and that the granting of the application of PFEL to serve Hawaii in domestic commerce would not result in unfair competition to Matson in the sense of Section 805(a). As to the Board's further determination that the granting of the application would be prejudicial to the objects and policy of the Act, the Court held that the Board's determination was unclear as to the basis for this decision. It thereupon vacated the judgment of the District Court and remanded the case to the Board for further proceedings, limited to the question of whether PFEL's entry into the trade would be prejudicial to the objects and policy of the Act. (R. 679-80.)

B. *The Status of PFEL*

Any nonsubsidized United States steamship operator is free to engage in domestic services between the continental United States and Hawaii without the granting of a franchise or other permission of any character. PFEL, which commenced operations to the Far East in 1946, was perfectly free to enter the Hawaiian domestic service until 1953, when it applied for and obtained from the Board operating subsidy with respect to its Far East service in foreign commerce. (J.A. 165, Exh. 25, pp. 7-8, J.A. 462-464.) Such operating subsidy, as well as construction subsidy, provided for by the Act, are denied operations in the domestic service, such as that conducted by Matson.

By so electing to obtain the benefits of operating subsidy, PFEL necessarily elected to bring itself within the limitations imposed by Section 805(a) of the Act. PFEL accepted similar limitations in Article II-15 of the operating subsidy contract which it executed with the United States, acting by the Board. (J.A. 164, Exh. 60, J.A. 547-548.)

In summary, PFEL was perfectly free to enter the Hawaiian domestic trade, without franchise or permission of any kind, so long as it remained unsubsidized. The Board, and subsequently the courts, became involved in this affair solely because PFEL elected to seek and obtain the Government's bounty.

Reasons for Granting the Writ

In the interest of limiting this petition, we respectfully refer the Court to, and incorporate herein by reference, the discussion set forth under this heading and elsewhere in the petition for a writ of certiorari from the judgment below filed by the Federal Maritime Board, the Maritime Administration, the Maritime Administrator and the Secretary of Commerce.

Reviewability of the Board's determination under Section 805(a) of the Act. As stated in the petition for certiorari above referred to, the success of the United States in maintaining one of the foremost merchant marines of the world in foreign commerce is due primarily to the subsidy program provided by the Act. Some 15 United States flag steamship lines have operating subsidy contracts with the United States, represented by the Board. On a week to week, and indeed a day to day, basis, the Board is called upon to determine innumerable matters in connection with the administration of these contracts. One such matter is presented by Section 805(a) of the Act, when, as here, an operator seeks a waiver of the statutory and contractual provisions prohibiting his engaging in the domestic trade.

If such determinations, and specifically the Board's determinations under Section 805 (a), are to be subjected to the intervention of the courts at the instance of the contracting operator, it is apparent that the work of the Board and the program of the United States will be seriously handicapped. The reviewability of such determinations presents an important question of federal law which has not been, but should be, settled by this Court.

Determinations under Section 805(a) would seem to present the classic situation for the denial of judicial review. The restraints of that provision, as we have seen, are not of general application but become operative only as to a steamship line which has deliberately elected to contract with the United States for subsidy payments. Certainly, PFEL has no constitutional or common law right to the payment of operating subsidy. Congress has offered such subsidy upon conditions, one of which is that the subsidized operator may not engage in domestic commerce without the written permission of the subsidy-paying party to the contract, that is, the United States of America. PFEL has been accorded the hearing which Congress provided before the Board, and its application has been denied. Having elected to obtain the benefits which Congress has granted, subject to conditions, the beneficiary must likewise accept the conditions.

Section 10 of the Administrative Procedure Act, Act of June 11, 1946, 5 U.S.C. 1009, 60 Stat. 237, excepts from judicial review cases where "(1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion." It can hardly be doubted, except in the case of "grandfather rights", that the Board is invested with discretion as to whether to grant under Section 805(a) the application of a subsidized contractor. In *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 317, this Court, in dealing with the complaints of steamship operators contract-

ing with the United States, re-emphasized that agency action involving "matters on which experts may disagree; . . . nice issues of judgment and choice . . . which require the exercise of informed discretion" constitutes "agency action . . . by law committed to agency discretion" and is not subject to judicial review. It is likewise difficult to discern in what manner PFEL, under Section 10(a) of the Administrative Procedure Act, has suffered any "legal wrong" or has been "adversely affected or aggrieved . . . within the meaning of any relevant statute."

The opinion of the Court of Appeals gives scant attention to this subject and makes no reference in this connection to the fact that the payment of the Government's bounty, subject to conditions, is involved. (R. 674-90.) Its decision on this point conflicts in principle with the holdings of this Court in *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113; *Butte, A. & P. Ry.* v. *United States*, 290 U.S. 127; *Gt. Northern Ry.* v. *United States*, 277 U.S. 172; *Work* v. *Rives*, 267 U.S. 175; and *United States* v. *Babcock*, 250 U.S. 328. And see *Chicago & S. Air Lines* v. *Waterman Corp.*, 333 U.S. 103.

The requirement of a Three-Judge District Court. Neither Section 805(a) of the Act nor any other of its sections contains any applicable provision for judicial review. However, Section 31 of the Shipping Act, 1916, as currently in effect, provides that the procedure to review orders of the Board shall be the same as that prescribed for review of orders of the Interstate Commerce Commission. The reference here is to the Urgent Deficiencies Act of 1913, now codified in the Judicial Code, 28 U.S.C. 1336, 2321-25.

Section 31 is now in large measure superseded by the Act of December 29, 1950, *supra*. The Court of Appeals has held, nevertheless, that orders entered under authority of the Merchant Marine Act, 1936, and specifically the determination here involved, are not reviewable under the Act of December 29, 1950, and this Court denied certiorari. *Pacific*

Far East Line, Inc. v. *United States and Federal Maritime Board, et al., supra.* It would seem to follow that if the determination herein is reviewable at all, Section 31 of the Shipping Act of 1916 controls.[3]

If Section 31 controls, it was essential that a three-judge district court be convened to hear the case; a single judge lacked power. This point is, of course, jurisdictional. *Lambert Co.* v. *Balt. & Ohio R.R. Co.*, 258 U.S. 377; *Ayrshire Corp.* v. *United States*, 331 U.S. 132; *cf. Stratton* v. *St. Louis S. W. Ry.*, 282 U.S. 10. Although this matter was called to the attention of both the District Court and the Court of Appeals, neither appears to have given it any consideration.

If, contrary to the views we have expressed above, determinations of the Board under Section 805(a) are subject to judicial review, the procedure for such review likewise presents an important question of federal law which has not been, but should be, settled by this Court.

The treatment by the Court of Appeals of the Board's determination under Section 805(a). (a) In substituting its own interpretation of the statute and its own appraisal of the facts in the light of that interpretation, for that of the Board, the Court of Appeals decided federal questions in a way in conflict with the applicable decisions of this Court. The interpretation and application of Section 805(a) which the Board brought to bear in the present proceedings are consistent with its line of decisions on this point both before and after the decision here. *American President Lines, Ltd.—Unsubsidized Operation, Route 17*, 3 F.M.B. 457 (1951); *American President Lines, Ltd.—Subsidy, Route 17*, 4 F.M.B. 488 (1954); *Isbrandtsen Company,*

[3] As the Review Act of 1950 recognizes, by its reference to the Intercoastal Shipping Act, 1933, 47 Stat. 1425, as amended, 46 U.S.C. 843, Section 31 of the 1916 Act is applicable to Board action under later statutes.

Inc.—Subsidy, E/B Round-the-World, 5 F.M.B. 448 (1958); *T. J. McCarthy—Application for Section 805(a) Permission*, dated December 4, 1959, modified April 26, 1960); *American President Lines, Ltd.—Applications Under Section 805(a), Merchant Marine Act, 1936*, decided April 28, 1960.

These decisions constitute a consistent and continued administration of the statute by the agency to which Congress has entrusted this task. Accordingly, the courts, even assuming that jurisdiction to review existed, are limited to ascertaining whether there is "warrant in the law and the facts" for what the agency has done. "Unless in some specific respect there has been prejudicial departure from requirements of the law or abuse of the" agency's "discretion, the reviewing court is without authority to intervene." *United States* v. *Pierce Auto Lines*, 327 U. S. 515, 536. Illustrative of this line of cases is *National Labor Relations Board* v. *Hearst Publications*, 322 U.S. 111, 130-131.

A careful reading of the opinion of the Court of Appeals demonstrates that, in fact, no substantial reason was given for refusing to accept the Board's interpretation and application of Section 805(a). The concluding paragraph of Section 805(a) makes it a misdemeanor for any operator to divert, directly or indirectly, moneys from subsidized foreign-trade operations into domestic operations. This provision obviously continues in operation even after an application has been granted under Section 805(a) of the Act; hence, it provides no test of the circumstances under which a pending application should be granted. Evidently referring to this paragraph, the Court of Appeals observed (R. 678):

> "Congress plainly did intend to prevent that sort of competion. *We need not consider whether it intended to prevent some other sorts as well.* We think Congress

clearly did not intend to prevent anything that the Board or the evidence attributes to PFEL." (Emphasis ours.)

It will be seen that by its refusal to consider what other sorts of competition Congress prohibited, the court failed to give consideration to the critical point in the case. Its condemnation of the Board's decision is a description of the court's conclusions rather than an analysis of wherein the Board was wrong.

(b) The Court of Appeals countenanced the intervention by the Department of Justice, even though the Department had failed to appear before the Board, and permitted it to urge before the courts an interpretation of Section 805(a) at war with the line of Board decisions above-mentioned. This action was taken by the Department of Justice, and tolerated by the Court of Appeals, despite the decision of this Court in *United States* v. *R.C.A.*, 358 U.S. 334. That decision would appear to leave the Department adequately free to enforce enactments entrusted to its care by the Congress, notwithstanding the decision of an administrative agency such as the Board. This action of the Department challenges, we submit, the fundamental principle of primary jurisdiction which has been developed and applied by this Court. *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426; *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U.S. 474; *Far East Conf.* v. *United States*, 342 U.S. 570; *United States* v. *Western Pac. R. Co.*, 352 U.S. 59; *S. W. Sugar Co.* v. *River Terminals*, 360 U.S. 411, 420-421.

In these circumstances the intervention of the Department of Justice in the court proceedings, after it had failed to appear before the Board, was in conflict with the applicable decisions of this Court, and makes appropriate an

exercise of this Court's power of supervision over the lower courts.

The Board's decision was correct. On the merits, the Board's decision was right, and little need be added to the discussion set forth in its petition for a writ of certiorari.

The Board properly took into consideration that "special concern for the protection" of the domestic operator which impelled Congress to include Section 805(a) in the Act. Pointing out that "doubts should be resolved" in favor of protection, the Board cited its own prior decisions to this effect. (J.A. 14, 16.) The Board properly did not make detailed findings to establish the benefit which the Government subsidy payments bestowed upon PFEL, and the advantage which the subsidized operator has over the unsubsidized domestic operator. Congress itself has established the nexus between (1) payment of subsidy to an operator in foreign commerce and (2) the presumptive unfair impact of the competition of such a subsidized operator upon an unsubsidized operator in domestic commerce.

The Board's determination that PFEL's competition would "seriously jeopardize" and "impede" Matson's Hawaiian service (J.A. 17) was not, and could not be, challenged by the Court of Appeals. Finding that Matson was maintaining an adequate service, the Board therefore concluded that Matson was "fundamentally entitled" (J.A. 16, 17) to the available cargo as against a subsidized operator, such as PFEL. At the same time, the Board carefully pointed out that any unsubsidized American operator is free to enter the trade in competition with Matson and others at any time without Board permission. (J.A. 11, 18.)

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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May, 1960.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15085

PACIFIC FAR EAST LINE, INC., APPELLANT

v.

FEDERAL MARITIME BOARD, ET AL., APPELLEES

No. 15086

UNITED STATES OF AMERICA, APPELLANT

v.

FEDERAL MARITIME BOARD, ET AL., APPELLEES

Appeals from the United States District Court for the District of Columbia

Decided February 4, 1960

Mr. Donald E. Van Koughnet for appellant in No. 15085.

Mr. Richard A. Solomon, Attorney, Department of Justice, with whom *Mr. Henry Gieller*, Attorney, Department of Justice, was on the brief, for appellant in No. 15086.

Mr. Edward Aptaker, Chief, Regulation Branch, Division of Litigation, Federal Maritime Board, with whom *Messrs. E. Robert Seaver*, General Counsel, Federal Maritime Board, *Robert E. Mitchell*, Assistant General Counsel, Federal Maritime Board, and *Edward Schmeltzer*, Attorney, Federal Maritime Board, were on the brief, for appellees Federal Maritime Board, Maritime Administration, Clarence G. Morse, Maritime Administrator, and Frederick H. Mueller, Secretary of Commerce.

Mr. Alvin J. Rockwell, with whom *Mr. Willis R. Deming* was on the brief, for appellee Matson Navigation Company.

Before EDGERTON, WILBUR K. MILLER, and BASTIAN, *Circuit Judges.*

EDGERTON, *Circuit Judge:* Pacific Far East Line, Inc. (PFEL) asked the District Court to set aside an order of the Federal Maritime Board and the Maritime Administrator (collectively called "the Board") denying PFEL's application for permission to operate unsubsidized vessels between the Pacific Coast and Hawaii.[1] The United States intervened in the District Court as a plaintiff in opposition to the Board's order. Matson Navigation Company (Matson), which had intervened before the Board in opposition to PFEL's application, intervened as a defendant in the District Court in support of the Board's order. These are appeals by the plaintiffs from an order of the District Court granting the defendants' motions for summary judgment.

Appellant PFEL operates a subsidized service between California and the Far East, and an unsubsidized service between California and Guam. Intervenor Matson has operated in the Pacific Coast-Hawaii trade for more than 70 years and is said to carry 98% of the cargo in that trade. Matson is not subsidized directly, but operates a subsidized service to Australia through Oceanic Steamship Co., a wholly-owned subsidiary.

Section 805(a) of the Merchant Marine Act of 1936, 46 U.S.C. § 1223(a), forbids the payment of a subsidy to any person who, without written permission from the Board, owns or operates vessels "in the domestic intercoastal or coastwise service", which of course includes the California-Hawaii trade that PFEL seeks to enter. Persons interested in an application for such permission are authorized to intervene before the Board, and the Board is required to "give a hearing to the applicant and the intervenors." The Board is not to grant permission if the Board "finds it will result in unfair competition to any person, firm, or corporation operating exclusively in

[1] We dismissed for want of jurisdiction a petition for direct review of the Board's order in this court, expressing no opinion as to the District Court's jurisdiction of the present suit. *Pacific Far East Line* v. *United States*, 103 U.S.App. D.C. 104, 255 F. 2d 182, *cert. denied*, 358 U.S. 866.

the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this chapter." It is made a misdemeanor for one who has received such permission "to divert, directly or indirectly, any moneys . . . used in foreign-trade operations, for which a subsidy is paid by the United States, into any such coastwise or intercoastal operations. . . ."

After a long hearing, the Board's examiner recommended granting PFEL's application. The Board denied it by a divided vote. The Board found that if the application were granted, PFEL "would be in a position to concentrate primarily on high value commodities, and would, in effect 'skim the cream' in this trade" between the Pacific Coast and Hawaii; that although PFEL's competition might divert less than 10% of Matson's tonnage, "the diversion of Matson revenues may be substantially greater"; that the diversion "would seriously jeopardize Matson's vessel replacement program, and would impede the proper development and continuation of Matson's California/Hawaii service"; and that the "record fails to show the need for service in excess of that presently provided by Matson and other existing operators". The Board concluded that "to permit PFEL to carry cargoes in the California/Hawaii trade would result in unfair competition to Matson in its California/Hawaii service, an exclusively domestic service, and would be prejudicial to the objects and policy of the Act." The Board thinks "a subsidized operator should not be permitted to deprive regular domestic carrjers of cargoes which they need, have the capacity to carry," and to which the Board considers them "fundamentally entitled".

Section 10 of the Administrative Procedure Act subjects "every agency action" to judicial review, except so far as "(1) statutes preclude judicial review or (2) agency action" is by law committed to agency discretion. . . ." 5 U.S.C. 1009. The Merchant Marine Act does not preclude judicial review and does not commit the Board's action to the Board's discretion. Administrative action that requires a hearing and turns on the meaning and application of statutory language is usually subject to

judicial review. As in *Shields* v. *Utal Idaho Central R. Co.*, 305 U.S. 177, 183, "The nature of the determination points to the propriety of judicial review." Nothing in the legislative history indicates a contrary intention. Accordingly the District Court had jurisdiction of this suit.

The Board did not find, and the evidence does not show, that PFEL would have any competitive advantage over Matson in the California-Hawaii trade because it has a subsidy in the Far East trade. As the examiner said, "Matson's witness admitted that the fact that PFEL has a subsidy would not permit PFEL to obtain more cargo in competition with Matson than it would without a subsidy." The Board did not find and the record does not show that PFEL would compete fraudulently; or that it would engage in cutthroat competition, either by fixing rates below cost and using the profits of its subsidized Far East trade to carry the loss, or by paying sub-standard wages, or by using sub-standard ships, or otherwise; or that it would compete in any way that is unfair according to accepted legal or ethical standards. The Department of Justice, on behalf of the United States, urges that competition is not "unfair" within the meaning of the Act when it does not involve diversion of money to unsubsidized domestic operations from subsidized foreign operations, to the disadvantage of an unsubsidized operator. Congress plainly did intend to prevent that sort of competition. We need not consider whether it intended to prevent some other sorts as well. We think Congress clearly did not intend to prevent anything that the Board or the evidence attributes to PFEL.

The Board practically equated unfair competition with effective competition. But what is bad for Matson is not necessarily bad for the country. However adequate Matson's service may be, and in whatever sense Matson may "need" to retain its monopoly of the California-Hawaii trade, we cannot accept the Board's view that Matson is "fundamentally entitled" to retain this monopoly as against a competitor that is subsidized—as Matson itself is, through its subsidiary Oceanic—in a different

trade. Service and need would be important if the Board were a public utility commission passing upon an application to enter a regulated field, but have nothing to do with the question whether PFEL's competition with Matson would be "unfair".

The Board has disclosed no basis for its finding that PFEL's entry into the trade would be "prejudicial to the objects and policy of the Act." Preservation of Matson's monopoly is not an object or policy of the Act. On the contrary, the public interest in ending this monopoly should be considered. The Act does not except the California-Hawaii trade from the anti-monopoly policy which Congress has often expressed.

The appellants do not ask that we reverse the Board's finding with regard to "objects and policy", but only that the case be remanded to the Board so that it may reconsider this finding and clarify it if it is retained. We are adopting this suggestion. The Board should, at least, "make the basis of its action reasonably clear. We cannot find that it did so here." *Radio Station KFH Co.* v. *Federal Communications Commission*, 101 U.S.App.D.C. 164, 166, 247, F. 2d 570, 572. "'Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency. . . . We must know what a decision means before the duty becomes ours to say whether it is right or wrong.'" *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 654.

The judgment is vacated, and the case is ordered to be remanded for further proceedings by the Board limited to the question whether PFEL's entry into the trade would be "prejudicial to the objects and policy of the Act."

Vacated and remanded.

APPENDIX B

Filed February 4, 1960. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1959.

Civil 1708-57

No. 15,085

PACIFIC FAR EAST LINE, INC., APPELLANT,

v.

FEDERAL MARITIME BOARD, ET AL., APPELLEES

September Term, 1959

Civil 1708-57

No. 15,086

UNITED STATES OF AMERICA, APPELLANT,

v.

FEDERAL MARITIME BOARD, ET AL., APPELLEES

Appeals from the United States District Court for the District of Columbia

Before: EDGERTON, WILBUR K. MILLER and BASTIAN, *Circuit Judges.*

JUDGMENT

These cases came on to be heard on the record on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREFORE, It is ordered and adjudged by this court that the judgment of the District Court in the case appealed from herein is vacated, and that the case is remanded to the said District Court for further proceedings by the Federal Maritime Board limited to the question whether Pacific Far East Line's entry into the trade would be prejudicial to the objects and policy of the Merchant Marine Act of 1936.

Per Circuit JUDGE EDGERTON.

Dated: February 4, 1960.

APPENDIX C

Statutes Involved

Section 31 of the Shipping Act, 1916, 39 Stat. 738, as amended, 46 U.S.C. 830, provides as follows:

> "The venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the Federal Maritime Board shall, except as otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties."

Title 28, U.S.C., 62 Stat. 869, as amended, contains the following provisions:

> Sec. 2321. "The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter."
>
> • • • • • • •
>
> Sec. 2322. "All actions specified in section 2321 of this title shall be brought by or against the United States."
>
> Sec. 2325. "An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."
>
> Sec. 2284. "In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:
>
> • • • • • • •

"(5) * * * A single judge shall not * * * enter a summary or final judgment. * * *"

Section 805(a) of the Merchant Marine Act, 1936, as amended, 46 U.S.C. 1223(a) provides:

"It shall be unlawful to award or pay any subsidy to any contractor under authority of sections 1177-1182 of this title, or to charter any vessel to any person under sections 1191-1204 of this title, if said contractor or charterer, or any holding company, subsidiary, affiliate, or associate of such contractor or charterer, or any officer, director, agent, or executive thereof, directly or indirectly, shall own, operate or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest, directly or indirectly, in any person or concern that owns, charters, or operates any vessel or vessels in the domestic intercoastal or coastwise service, without the written permission of the Federal Maritime Board or the Secretary of Commerce. Every person, firm, or corporation having any interest in such application shall be permitted to intervene and the Board or Secretary shall give a hearing to the applicant and the intervenors. The Board or Secretary shall not grant any such application if the Board or Secretary finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this chapter: *Provided*, That if such contractor or other person above-described or a predecessor in interest was in bona-fide operation as a common carrier by water in the domestic, intercoastal, or coastwise trade in 1935 over the route or routes or in the trade or trades for which application is made and has so operated since that time or if engaged in furnishing seasonal service only, was in bona-fide operation in 1935 during the season ordinarily covered by its operation, except in either event, as to interruptions of service over which the applicant or its predecessor in interest had no

control, the Board or Secretary shall grant such permission without requiring further proof that public interest and convenience will be served by such operation, and without further proceedings as to the competition in such route or trade.

"If such application be allowed, it shall be unlawful for any of the persons mentioned in this section to divert, directly or indirectly, any moneys, property, or other thing of value, used in foreign-trade operations, for which a subsidy is paid by the United States, into any such coastwise or intercoastal operations; and whosoever shall violate this provision shall be guilty of a misdemeanor."

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Office-Supreme Court, U.S.
FILED
JUN. 3 1960
JAMES R. BROWNING, Clerk

Nos. 906 and 907

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

MATSON NAVIGATION COMPANY, *Petitioner*

v.

PACIFIC FAR EAST LINE, INC. ET AL, *Respondents*

FEDERAL MARITIME BOARD ET AL, *Petitioners*

v.

PACIFIC FAR EAST LINE, INC. ET AL, *Respondents*

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PACIFIC FAR EAST LINE, INC. IN OPPOSITION

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June 3, 1960

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR PACIFIC FAR EAST LINE, INC. IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 674-679),[1]

[1] "R" refers to the certified copy of the record in the United States Court of Appeals for the District of Columbia Circuit, which has been filed with the Clerk of this Court.

which is not yet reported, is set forth in the petitions (Bd. 27-32; Mat. 15-19).[2]

JURISDICTION

The judgment of the Court of Appeals (Bd. 33; Mat. 20) was entered on February 4, 1960. The petitions were filed on May 4, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), 62 Stat. 928.

QUESTIONS PRESENTED

1. Whether the Board's denial of an application under Section 805(a) of the Merchant Marine Act, 1936 by Pacific Far East Line, Inc. (hereinafter referred to as "PFEL"), a subsidized carrier in the foreign trade, to operate an unsubsidized Pacific Coast—Hawaii service in the domestic trade is subject to judicial review.

2. Whether the Court of Appeals correctly held that the Board misconstrued the standard of "unfair competition" contained in Section 805(a) in denying on that ground PFEL's application to enter the Pacific Coast—Hawaii trade in competition with an existing

---

[2] "Bd. —" refers to the petition for certiorari filed by the Federal Maritime Board and Maritime Administration, hereinafter collectively referred to as the "Board"; "Mat. —" refers to the petition for certiorari filed by the Matson Navigation Company, hereinafter referred to as "Matson"; and "U.S. —" refers to the brief filed by the United States in opposition to the petitions.

The printed record in the court below consisted of the Joint Appendix in Case No. 14,007, *Pacific Far East Line, Inc.* v. *United States*, 255 F. 2d 182 (C.A.D.C.), *cert. denied*, 358 U.S. 866 (1958), hereinafter referred to as "J.A. —," and a new Joint Appendix in the instant appeals case Nos. 15,085 and 15,086 in the court below, hereinafter referred to as "J.A.S. —."

domestic service in that trade by Matson, also a subsidized carrier in the foreign trade.

3. Whether the Court of Appeals correctly held that the Board's finding that PFEL's entry into the domestic trade would be "prejudicial to the objects and policy" of the Merchant Marine Act, 1936 (a) lacked any basis for enabling the Court of Appeals to determine the validity of the finding and (b) failed to take into consideration Matson's monopoly of the California-Hawaii trade.[3]

STATUTES INVOLVED

Section 805(a) of the Merchant Marine Act, 1936, 46 U.S.C. § 1223(a), and the relevant provisions of Section 10 of the Administrative Procedure Act, 5 U.S.C. § 1009, are set forth in the Appendix, *infra*, pp. 12-13.

STATEMENT OF THE CASE

The case is adequately stated in the Brief for the United States in Opposition to the petitions (U.S. 3-6).

ARGUMENT

Petitioners' sweeping assertions that the decision of the court below opens the door for the invasion of the domestic coastwise and intercoastal water trades by

---

[3] Matson, but not the Board, adds an additional question (Mat. 3), the purpose of which is to seek review of the order of the district court (J.A.S. 25) granting the motion of the United States for intervention under Rule 24(b) of the Federal Rules of Civil Procedure. Since Matson did not appeal from the district court's order permitting intervention of the United States, it has no standing to raise this question before this Court. In any event, the discretion exercised by the district court should not be upset. See *Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio Railroad Co.*, 331 U.S. 519, 521-526 (1947).

subsidized carriers, that this decision adversely affects national defense policy in the maintenance of a deep water fleet serving the domestic trades and that this decision "throws open to judicial review" a determination "which is committed to agency discretion" (Bd. 9, 12-13)[4] have no basis in the record. This litigation, simply stated, involves only the attempt of an administrative agency (the Board) to avoid judicial review of an agency determination plainly subject to judicial review, to support an unjustifiable and plain misconstruction of a statute administered by the agency and to avoid giving any explanation of an ultimate determination required to be made by the agency on the basis of a hearing.

The precise perspective of this litigation is further beclouded by petitioners' failure to state certain material facts. Petitioners acknowledge that any nonsubsidized United States steamship operator may lawfully engage in domestic service between the Pacific Coast and Hawaii without the "written permission" of the Board under Section 805(a) of the Merchant Marine Act, 1936,[5] and that it is *solely because* PFEL *is* a subsidized operator in the foreign trade that it must secure the "written permission" of the Board under Section 805(a) prior to engaging in a nonsubsidized domestic service between the Pacific Coast and Hawaii (Bd. 14; Mat. 6),

Petitioners, however, would have this Court believe that a "fundamental condition" attached to PFEL's

---

[4] Matson's petition incorporates by reference the assertions of the Board in respect of the effect of the decision of the court below (Mat. 7).

[5] Section 805(a) of the Merchant Marine Act, 1936 is hereinafter referred to as "Section 805(a)."

subsidy contract with the Board for service in the foreign trade in that PFEL waived the right to engage in nonsubsidized service in the domestic trade (Bd. 9-11; Mat. 7-9). The fact is that PFEL's subsidy contract contains only the provision that PFEL will not engage in domestic service "without the permission of the United States granted pursuant to Section 805(a) . . ." (J.A. 548). This is the standard provision in any subsidy contract, and PFEL would be subject to Section 805(a) without this provision because it is a subsidized operator.

Petitioners would also have this Court believe that the basic issue before the Board, raised by PFEL's application for "written permission" under Section 805(a) to engage in nonsubsidized domestic service between the Pacific Coast and Hawaii, was the effect that PFEL's competition in nonsubsidized domestic service would have upon an exclusively domestic operator, namely, Matson (Bd. 8, 13, 24-25; Mat. 4, 13). The fact is that Matson is a subsidized operator in the foreign trade as is PFEL.

The only difference between PFEL and Matson in respect of their subsidy status is that PFEL is subsidized *qua* PFEL and that Matson has a wholly owned and directly managed subsidiary, Oceanic Steamship Company, which is a subsidized operator in the foreign trade (J.A. 9-10, 502-505, 542).[6] Even Matson's California-Hawaii operations are not exclusively a domes-

[6] The court below properly wasted no time in piercing the veil in respect of Matson's subsidy status. The court concluded that "we cannot accept the Board's view that Matson is 'fundamentally entitled' to retain this [Matson's] monopoly as against a competitor that is subsidized—as Matson itself is, through its subsidiary Oceanic—in a different trade" (Bd. 31; Mat. 18-19).

tic service since Oceanic's vessels not only operate in the California-Hawaii trade as part of their subsidized foreign voyage but do so with the Board's permission (J.A. 485-487, 579).

1. *The court below correctly held that the Board's determinations under Section 805(a) are subject to judicial review.* Petitioners assert that the Board's determinations under Section 805(a) are discretionary in nature and that therefore they are committed by law to agency discretion (Bd. 9-10; Mat. 7-9). Section 805(a) itself plainly refutes this assertion. If the Board finds that the grant of an application by a subsidized carrier to engage in the domestic service would not result in "unfair competition" to any carrier operating exclusively in such service and that the grant of such application would not be prejudicial to the "objects and policy" of the Merchant Marine Act, 1936, the Board has no discretion but to grant such application.

As the court below properly stated, the Merchant Marine Act, 1936 "does not preclude judicial review and does not commit the Board's action to the Board's discretion" (Bd. 30; Mat. 17). The Board's determinations under Section 805(a) do not therefore fall within the exceptions to rights of review provided by Section 10 of the Administrative Procedure Act.[7] See *Heikkila* v. *Barber*, 345 U.S. 229, 232-233 (1953); *Dismuke* v. *United States*, 297 U.S. 167 (1936).

The review afforded respondents by the court below of the Board's determination under Section 805(a) involved review of the application of statutory standards to the facts of a particular case, not review of a determination essentially discretionary by nature such as the

[7] Appendix, *infra*, p. 13.

award of a subsidy or loan. The Board's determination was based on a "hearing," which Section 805(a) required the Board to give PFEL and intervenor Matson. Here, as in *Shields* v. *Utah Idaho Central Railroad Co.*, 305 U.S. 177, 182-183 (1938), "The requirement of a 'hearing' has obvious reference 'to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts' " and "The nature of the determination points to the propriety of judicial review." Any possible doubt that determinations such as those required by Section 805(a) are judicially reviewable was clearly resolved by this Court in *Stark* v. *Wickard*, 321 U.S. 288 (1944).[8] As the court below pointed out, "Nothing in the legislative history [of the Merchant Marine Act, 1936] indicates a contrary intention" (Bd. 30; Mat. 18).

Petitioners also assert that PFEL lacks standing to seek judicial review of the Board's denial of its application under Section 805(a) because PFEL is not "suffering legal wrong" or "adversely affected or aggrieved by such action within the meaning of any relevant statute . . ." as required by Section 10(a) of the Administrative Procedure Act (Bd. 10-11; Mat. 9).[9] The cases cited by petitioners in support of this assertion (Bd. 11; Mat. 9) are wholly inapposite in that, unlike the cases cited, Section 805(a) specifically gives applicants for "written permission" under this Section

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[8] Subsequently, this Court reaffirmed its holding in the *Stark* case. *Estep* v. *United States*, 327 U.S. 114 (1946); *Federal Reserve System* v. *Agnew*, 329 U.S. 441 (1947); *United States* v. *Interstate Commerce Commission*, 337 U.S. 426 (1949); *Harmon* v. *Brucker*, 355 U.S. 579 (1958).

[9] Appendix, *infra*, p. 13.

the right to a hearing before the Board; and if an applicant meets the "unfair competition" and the "objects and policy" tests of this Section, the Board is required to give its "written permission." PFEL is clearly "adversely affected" by the Board's action and suffers "legal wrong" within the meaning of Section 10(a) of the Administrative Procedure Act when it is denied "written permission" to enter the domestic trade on the basis of the Board's misconstruction of the statutory standards for "written permission."[10]

2. *The court below correctly held that the Board denied PFEL's application on the basis of misconstruction of the standard of "unfair competition" contained in Section 805(a).* The Board, in reading its own meaning into the test of "unfair competition," has admittedly made this test solely "an adequacy of service test" (Bd. 18). The effect of the Board's test of "unfair competition" is that the competition of any applicant for "written permission" under Section 805(a) is automatically determined by the Board to be "unfair competition" if such competition is felt by a domestic operator that "needs" and "has the capacity" to carry available cargoes (J.A. 17). Clearly, "an adequacy of service test" is not the test of "unfair competition" notwithstanding the Board's studied effort to substitute its own meaning for this test of Section 805(a).

---

[10] Matson, but not the Board, asserts that judicial review of this case should have been had, if at all, before a three-judge district court (Mat. 9-10). The fact that Matson did not seriously press this claim in the courts below is evident from Matson's disclosure to this Court that such claim was only "called to the attention" of the courts below (Mat. 10). In any event, this claim was properly rejected by the courts below for the reasons cogently stated by the United States (U.S. 8, Note 7).

It is abundantly clear from the legislative history of Section 805(a)[11] that the purpose of this Section was to prevent United States steamship operators who are subsidized in the foreign trade from using their subsidies to compete with nonsubsidized United States operators in the domestic trade. As the court below stated, "The Board did not find, and the evidence does not show, that PFEL would have any competitive advantage over Matson in the California-Hawaii trade because it has a subsidy in the Far East trade" (Bd. 30). Indeed, as the court below noted, Matson's witnesses in the proceeding before the Board "admitted that the fact that PFEL has a subsidy would not permit PFEL to obtain more cargo in competition with Matson than it would without a subsidy" (Bd. 30-31).

The complete fallacy of the Board's test of "unfair competition" could not be more accurately stated than that, as the court below pointed out, "The Board practically equated unfair competition with effective competition" (Bd. 31).

3. *The court below correctly held that the Board failed to disclose any basis for enabling the court to determine the validity of the Board's finding that PFEL's entry into the domestic trade would be "prejudicial to the objects and policy" of the Merchant Marine Act, 1936.* The Board simply concluded that because it had found that PFEL's application for "written permission" under Section 805(a) would result in "unfair competition" to Matson the grant of this application would *a fortiori* "be prejudicial to the objects and policy" of the Act. The Board did not explain what objects or what policy of the Act would

[11] A concise outline of the legislative history of Section 805(a) is presented by the United States (U.S. 10-11).

be prejudiced, much less in what respects they would be prejudiced. As the court below stated, "'We must know what a decision means before the duty becomes ours to say whether it is right or wrong.' *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 654" (Bd. 32). The court below did not reverse the Board's finding in respect of the "objects and policy" of the Act, but remanded the case to the Board "so that it may reconsider this finding and clarify it if if is retained" (Bd. 32).

It is perfectly clear that the Board did not take into account in respect of the "objects and policy" of the Merchant Marine Act, 1936 the undisputed fact that Matson has a monopoly position to the extent of at least 98% of all cargoes moving by surface between the United States and Hawaii. The court below correctly stated that "the public interest in ending this monopoly should be considered" by the Board and the "Preservation of Matson's monopoly is not an object or policy of the Act" (Bd. 32). The far flung reach of Matson's monopoly of the trade and the economy of the State of Hawaii was even recognized by the Board (J.A. 8-9), which makes the more incredible the Board's failure to give it any weight in determining whether the grant of PFEL's application for "written permission" under Section 805(a) would serve the "objects and policy" of the Act.

CONCLUSION

The decision of the court below is clearly correct, there is no conflict of decisions and there is no important question warranting review by this Court.

For the foregoing reasons it is respectfully submitted that the petitions for writs of certiorari should be denied.

Respectfully submitted,

DONALD E. VAN KOUGHNET
Attorney for Respondent
Pacific Far East Line, Inc.

June 3, 1960

APPENDIX

Section 805(a) of the Merchant Marine Act, 1936, 49 Stat. 2012, 52 Stat. 963, 1950 Reorg. Plan No. 21, §§ 105(1), 204, 306, 15 F. R. 3178, 64 Stat. 1274-1276, 66 Stat. 765, 46 U. S. C. § 1223(a), provides as follows:

> It shall be unlawful to award or pay any subsidy to any contractor under authority of sections 1171-1182 of this title, or to charter any vessel to any person under sections 1191-1204 of this title, if said contractor or charterer, or any holding company, subsidiary, affiliate, or associate of such contractor, or charterer, or any officer, director, agent, or executive thereof, directly or indirectly, shall own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest, directly or indirectly, in any person or concern that owns, charters, or operates any vessel or vessels in the domestic intercoastal or coastwise service, without the written permission of the Federal Maritime Board or the Secretary of Commerce. Every person, firm, or corporation having any interest in such application shall be permitted to intervene and the Board or Secretary shall give a hearing to the applicant and the intervenors. The Board or Secretary shall not grant any such application if the Board or Secretary finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this chapter: *Provided*, That if such contractor or other person above described or a predecessor in interest was in bona-fide operation as a common carrier by water in the domestic, intercoastal, or coastwise trade in 1935 over the route or routes or in the trade or trades for which application is made and has so operated since that time or if engaged in furnishing seasonal service only, was in bona-fide operation in 1935 during the season ordinarily covered by its operation, except in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Board or Secretary shall grant such permission without requiring further proof that public interest and convenience will be served by such opera-

tion, and without further proceedings as to the competition in such route or trade.

If such application be allowed, it shall be unlawful for any of the persons mentioned in this section to divert, directly or indirectly, any moneys, property, or other thing of value, used in foreign-trade operations, for which a subsidy is paid by the United States, into any such coastwise or intercoastal operations; and whosoever shall violate this provision shall be guilty of a misdemeanor.

Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. § 1009, provides in portions here material as follows:

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

RIGHTS OF REVIEW

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

FORM AND VENUE OF PROCEEDINGS

(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

ACTS REVIEWABLE

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review * * *

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FEDERAL MARITIME BOARD, ET AL., PETITIONERS

v.

PACIFIC FAR EAST LINE, INC., UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 906

MATSON NAVIGATION COMPANY, PETITIONER

v.

PACIFIC FAR EAST LINE, INC. UNITED STATES OF AMERICA, ET AL.

No. 907

FEDERAL MARITIME BOARD, ET AL., PETITIONERS

v.

PACIFIC FAR EAST LINE, INC., UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Bd. 27–31)[1] is

[1] "Bd. ——" refers to the petition for certiorari filed by the Federal Maritime Board, et al. in No. 907, and "Mat. ——" to the petition of Matson Navigation Company in No. 906.

reported at 275 F. 2d 184. No opinion was rendered by the district court. The opinion of the Federal Maritime Board and Maritime Administrator ("the Board") (J.A. 1–21) [2] is reported at 5 F.M.B.-M.A. 287.

JURISDICTION

The judgment of the court of appeals (Bd. 33) was entered on February 4, 1960. The petitions for writs of certiorari were filed on May 4, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Section 805(a) of the Merchant Marine Act, 1936, prohibits a subsidized water carrier from operating in the coastwise service without permission of the Federal Maritime Board. The Board cannot grant such permission if it finds (1) that the grant will result in "unfair competition" to unsubsidized domestic carriers, or (2) that it would be "prejudicial to the objects and policy" of the Act. The following questions are presented:

1. Whether a Board order denying such permission is subject to judicial review.

2. Whether the Board's holding that competition by a subsidized carrier is "unfair" merely because it will divert from an unsubsidized domestic carrier traffic that the latter "needs" and serves adequately, without regard to whether there would be any diversion of

[2] The printed record in the court below consisted of the Joint Appendix used in the No. 14,007, *Pacific Far East Line* v. *United States*, 25[illegible] 2d 182 (C.A.D.C.), certiorari denied, 358 U.S. 866, referred to herein as "J.A. ——", and a new joint appendix in the instant appeals, case Nos. 15,085 and 15,[illegible]6 in the court below, cited here as "J.A.S. ——".

subsidy to domestic operations, misconstrued the standard of "unfair competition".

3. Whether the court of appeals correctly held that the Board's finding that a subsidized carrier's proposed unsubsidized domestic service would be "prejudicial to the objects and policy" of the Act—

a. lacked adequate supporting basis upon which the court could determine its validity; and

b. was also invalid because the Board had not considered the public interest in ending the monopoly which the unsubsidized carrier had in the trade.

STATUTES INVOLVED

Section 805(a) of the Merchant Marine Act, 1936, 46 U.S.C. 1223(a), and the pertinent provisions of Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009, are set forth in the Appendix, *infra*, pp. 15–17.

STATEMENT

Section 805(a) of the Merchant Marine Act, 1936 (*infra*, pp. 15–16) prohibits a subsidized water carrier from engaging in the domestic intercoastal or coastwise service without the written permission of the Board; and it provides that the Board shall not grant such permission if it finds that the grant (1) will result in unfair competition to any person operating exclusively in the coastwise or intercoastal service, or (2) would be "prejudicial to the objects and policy" of the Act.

Pacific Far East Line, Inc. ("PFEL") operates a subsidized service between California ports and the

Far East, and an unsubsidized service between such ports and Guam (J.A. 5). In December 1954 it sought permission from the Board under Section 805(a) to operate an unsubsidized Pacific Coast-Hawaii service (J.A. 3). Matson Navigation Company ("Matson"), an unsubsidized carrier in the Pacific Coast-Hawaii trade for 73 years,[1] opposed the application. Matson is closely interlocked with major sugar, pineapple and other important economic interests in the Hawaiian Islands, and carries 98% of the cargo in the trade to and from the Islands (J.A. 20, 24–26).

After a lengthy hearing, the examiner recommended that the application be granted (J.A. 22–35). The Board, however, reversed and, by a two-to-one vote, denied the application (J.A. 1–21). The Board found that although PFEL competition might divert less than 10% of Matson's tonnage in the trade, "the diversion of Matson's revenues may be substantially greater" (J.A. 15); that such diversion of cargo "would seriously jeopardize Matson's replacement program, and would impede the proper development and continuation of Matson's California/Hawaii service" (J.A. 17); and that the "record fails to show the need for services in excess of that presently provided by Matson and other existing operators" (J.A. 16). Applying the principle that "a subsidized operator should not be permitted to deprive regular domestic carriers of cargoes which they need, have the capacity

[1] Although Matson itself is unsubsidized, it operates a subsidized service to Australia through a wholly-owned subsidiary, Oceanic Steamship Co. (J.A. 9–10).

to carry, and to which they are fundamentally entitled" (J.A. 16–17), the Board concluded (J.A. 17) that "to permit PFEL to carry cargoes in the California/Hawaii trade would result in unfair competition to Matson in its California/Hawaii service, an exclusively domestic service, and would be prejudicial to the purposes and policy of the Act."

PFEL sought review of the Board's order in the district court, under Section 10 (a) and (b) of the Administrative Procedure Act, 5 U.S.C. 1009 (a) and (b).[4] Pursuant to Rule 24(b) of the Federal Rules of Civil Procedure, the United States was granted leave to intervene as a party plaintiff to urge that the Board's order should be reversed (J.A.S. 22, 25). The Board and intervening defendant Matson moved for dismissal for lack of jurisdiction or, in the alternative, for summary judgment; PFEL moved for summary judgment setting aside the Board's order. After oral argument on these various motions, the district court, ruling from the bench without opinion, granted the defendants' motion for summary judgment (J.A.S. 36).

The court of appeals unanimously reversed. It held that the district court had jurisdiction of the suit under Section 10 of the Administrative Procedure Act (Bd. 30). It set aside the Board's conclusion of unfair competition. It stated that the Board had "not [found], and the evidence does not show, that PFEL

[4] At the same time, PFEL filed a petition seeking review of this same order in the Court of Appeals for the District of Columbia Circuit. This was dismissed for want of jurisdiction. *Pacific Far East Line* v. *United States*, 255 F. 2d 182 (C.A.D.C.), certiorari denied, 358 U.S. 866.

would have any competitive advantage over Matson in the California-Hawaii trade because it has a subsidy in the Far East trade" (*ibid.*); that the Board, in effect, "equated unfair competition with effective competition" (Bd. 31); that although Congress "plainly" intended to prevent "diversion of money to unsubsidized domestic operations from subsidized foreign operations * * * Congress clearly did not intend to prevent anything that the Board or the evidence attributes to PFEL" (*ibid.*); and that the adequacy of Matson's service and Matson's need for the traffic had "nothing to do with the question whether PFEL's competition with Matson would be 'unfair' " (*ibid*).

The court of appeals further held that the Board had disclosed no basis for its finding that PFEL's entry into the trade would be "prejudicial to the objects and policies of the Act," and that in resolving this issue, the Board must consider "the public interest in ending [Matson's] monopoly" (Bd. 32). Accordingly, it remanded the case to the Board with directions to "make the basis of its action reasonably clear" with respect to whether PFEL's entry into the trade would be "prejudicial to the objects and policy of the Act" (*ibid.*).

ARGUMENT

1. Petitioners contend (Bd. 9–12; Mat. 7–10) that the Board's denial of PFEL's Section 805(a) application is not subject to judicial review because such action is committed by law to agency discretion. But, as the court below pointed out (Bd. 30), the Act "does not preclude judicial review [nor] commit the

Board's action to the Board's discretion." See Section 10 (a), (c), Administrative Procedure Act, 5 U.S.C. 1009 (a), (c); *Heikkila* v. *Barber*, 345 U.S. 229, 232–233; *Dismuke* v. *United States*, 297 U.S. 167.[5] The Board's action under Section 805(a) is closely analogous to the traditional adjudicatory licensing function; the Board is to grant the application unless it finds that a grant would result in "unfair competition" to a specified class or would be "prejudicial to the [Act's] objects and policy," and it is required to afford a hearing to the applicant and the intervenors. Here, as in *Shields* v. *Utah Idaho Central R. Co.*, 305 U.S. 177, 183, "[t]he nature of the determination points to the propriety of judicial review." Review is not being sought of an inherently discretionary type of function such as the award of a subsidy or loan,[6] but rather of the application of statutory criteria to the facts of a particular case. This Court has made clear the availability of review in such circumstances. See, *e.g.*, *Stark* v. *Wickard*,

[5] As the court below correctly stated (Bd. 30), nothing in the legislative history of the Act indicates non-reviewability. Indeed, where Congress in the Act wished to preclude judicial review or to commit action to agency discretion, it did so in specific terms. See, *e.g.*, Sections 608, 804, 46 U.S.C. 1178, 1222.

[6] Petitioners suggest (Bd. 9–11; Mat. 7–9) that the case turns on a "fundamental condition" attached to PFEL's subsidy contract and involves the question of the reviewability of the Board's administration of these subsidy contracts. But the PFEL subsidy contract simply contains a standard provision that PFEL will not engage in domestic service "without the permission * * * granted pursuant to section 805(a) * * *" (J.A. 548).

321 U.S. 288; *Board of Governors of the Federal Reserve System* v. *Agnew*, 329 U.S. 441.

Petitioners argue (Bd. 10–11; Mat. 9) that PFEL is not "suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute * * *", as required by Section 10(a) of the Administrative Procedure Act, 5 U.S.C. 1009(a). But unlike the cases petitioners cite (Bd. 11; Mat. 9), here the statute gives PFEL the "legal right" to operate in the domestic trade unless the Board finds that such operation will result in the proscribed unfair competition or be prejudicial to the statutory objects and policy. Clearly, PFEL is "adversely affected in fact by agency action * * *" (S. Doc. No. 248, 79th Cong., 2d Sess., pp. 212, 276) and suffers "legal wrong" within the meaning of Section 10(a) (see *id.* at pp. 212, 276, 308–311, 325) when it is denied permission to enter the domestic shipping trade because of the Board's erroneous construction of the statutory criteria. See *Leedom* v. *Kyne*, 358 U.S. 184, 188–191, 201 (dissenting opinion); *Stark* v. *Wickard*, *supra*.[7]

[7] Matson's claim (Mat. 9–10) that the case should have been heard by a three-judge district court was properly rejected by the courts below. Matson asserts (n. 3, p. 10) that Section 31 of the Shipping Act of 1916, which requires such a three-judge court, "is applicable to Board action under later statutes." It relies on the fact that the Review Act of 1950, 5 U.S.C. 1032, refers to Board orders "entered under authority of the Shipping Act, 1916, as amended, *and the Intercoastal Shipping Act, 1933*, as amended, as are now subject to judicial review pursuant to the provisions of Section [31] * * *" (emphasis supplied). But the reason that the 1950 Act referred to the Intercoastal Shipping Act, 1933, was that Section 5 of that Act, 47 Stat. 1427, expressly makes the provisions of the Shipping

2. The court of appeals correctly held that the Board has misconstrued the standard of unfair competition in Section 805(a). The Board concededly has equated the standard of "unfair competition" to "an adequacy of service test" (Bd. 18). Under its view, a subsidized carrier competes unfairly with an exclusively domestic carrier unless the latter is not rendering adequate service or does not "need" the cargo which would be diverted (J.A. 17). As the court below stated (Bd. 30–31), the Board "did not find * * * that PFEL would have any competitive advantage over Matson in the California-Hawaii trade because it has a subsidy in the Far East trade", but simply "equated unfair competition with effective competition." The Board's interpretation runs coun-

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Act of 1916 "applicable to common carriers by water in intercoastal commerce." There is no similar provision in the Merchant Marine Act, 1936. Moreover, the legislative history of the Judicial Review Act of 1950 makes clear that it was "directed at dispensing with the cumbersome three judge court procedure * * *" (*D. L. Piazza Co.* v. *West Coast Line*, 210 F. 2d 947, 949 (C.A. 2), certiorari denied, 348 U.S. 839) to the extent that such procedure was applicable to certain orders of the specified agencies, including Board orders under the 1916 and 1933 Acts. See H. Rept. No. 2122, 81st Cong., 2d Sess., pp. 1, 2, 4; S. Rept. No. 2618, 81st Cong., 2d Sess., pp. 1–2, 5. In any event, the fact that this question has not previously arisen since the enactment of the 1936 Act shows that it is not a matter of substantial importance.

Matson also challenges (Mat. 3) the district court's permitting the United States to intervene. But since Matson did not cross appeal on this issue, it cannot now raise it. *Bolles* v. *Outing*, 175 U.S. 262. In any event, Matson has failed to show that the district court abused its discretion in granting intervention. See *Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 524–525; *Allen Calculators, Inc.*, v. *National Cash Register Co.*, 322 U.S. 137, 142.

ter to the plain meaning of the statute and its legislative history. If Congress had intended to adopt an adequacy of service standard (with which it was, of course, familiar), it would have done so, instead of employing the completely different language of unfair competition.

The legislative history shows that Section 805(a) was aimed at correcting the abuses that had developed under the Merchant Marine Act of 1928 (45 Stat. 689), whereby extensive subsidies paid to operators in foreign commerce (in the form of mail pay contracts) were diverted into domestic operations. There were frequent references to the fact that such diversion constitutes "unfair competition with unsubsidized American lines * * *" in the same trade. H. Rept. No. 1277, 74th Cong., 1st Sess., p. 35; see, also, S. Rept. No. 898, 74th Cong., 1st Sess., pp. 14–15, 42–44; H. Doc. No. 418, 74th Cong., 1st Sess., pp. 11, 18. Despite support for the view that no subsidy should be paid to any carriers engaged in any domestic operations (see, *e.g.*, 79 Cong. Rec. 6499; Hearings on S. 3500, 74th Cong., 2d Sess., p. 126; H.R. 7854, H.R. 7981, 74th Cong., 1st Sess.), Congress refused to include such a blanket prohibition in the Act. Instead, it prohibited subsidized carriers from competing with domestic operators only if such competition was found to be "unfair," or the entry of the subsidized carrier into the domestic service would be prejudicial to the objects and policy of the Act. This legislative history[8] indicates that the competition which Congress

[8] Significantly, there is no reference in the legislative history to "need", "capacity", "fundamentally entitled," or "adequacy."

condemned as "unfair" in Section 805(a) is that of a subsidized operator gaining an unfair advantage over an unsubsidized carrier by diverting foreign subsidy moneys into domestic operations.

The fact that the second paragraph of the section makes it a misdemeanor to divert any subsidy to domestic operations after the Board has granted an application does not mean, as the Board contends (Bd. 19), that Congress did not make diversion the standard of unfair competition in the first paragraph. On the contrary, the second paragraph was obviously designed (1) to insure that carriers which receive Section 805(a) authority do not thereafter divert subsidy moneys into domestic operations and (2) to protect against more subtle forms of diversion (see H. Doc. No. 118, *supra*, at p. 18) which it might be difficult to discover at the administrative hearing. Indeed, the fact that subsequent subsidy diversion is specifically made illegal is a further indication that the competition which Congress condemned as "unfair" is that which involves such diversion.

Petitioners further rely (Bd. 14–15; Mat. 10–11) on the Board's "consistent" interpretation "that Section 805(a) warrants permission only where the exclusively domestic services are inadequate * * *" (Bd. 14). But this interpretation of "unfair competition" was not enunciated until 1951, 15 years after passage of the Act. In view of the plain meaning of the statute and its legislative history (see *supra*, pp. 9–11), we submit that the Board's recent contrary interpretation is not entitled to any significant weight. Cf. *Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 499–500.

3. The court of appeals held (Bd. 32) that the Board "has disclosed no basis for its finding that PFEL's entry into the trade would be 'prejudicial to the objects and policy of the Act.'" However, the court did not reverse that finding, but merely remanded the case to the Board "so that it may reconsider this finding and clarify it if it is retained" (*ibid.*). Since there has thus been no final determination whether the PFEL application is consistent with the statutory objects and policy, there is no occasion for review of that issue at this time.

The court below was clearly correct in ruling that the Board had failed to disclose the basis for its finding that grant of PFEL's application would be "prejudicial to the objects and policy" of the Act. The Board did not explain what objects and policy would be prejudiced, or in what respects.[9] It merely concluded, upon the same findings on which it based its holding of unfair competition, that the grant would also violate the prejudice standard. In the circumstances, the court of appeals was fully warranted in requiring the Board to clarify the basis of its ruling; in any event, its action does not warrant review by this Court.

As the court ruled, the Board, in determining whether entry of PFEL into the trade would be consistent with the statutory objects and policy, was required to consider "the public interest in ending" (Bd. 32) Matson's "virtual monopoly in carriage of cargoes moving between the Pacific Coast and

[9] The objects of the Act are set out in § 210 (46 U.S.C. 1120), and the policy in § 101 (46 U.S.C. 901).

Hawaii" (dissenting opinion, J.A. 20).[10] Among the policies of the Merchant Marine Act, 1936, is that "the United States shall have a merchant marine * * * sufficient to carry its domestic water-borne commerce; * * * capable of serving as a naval and military auxiliary in time of war or national emergency * * * [and] composed of the best-equipped, safest, and most suitable types of vessels * * *" (46 U.S.C.A. 1101). Providing competition to a monopoly such as Matson's "unquestionably has bearing on the achievement" (*McLean Trucking Co.* v. *United States*, 321 U.S. 67, 87) of that policy. Of course, the weight to be attached to the competitive factor is primarily for the Board. But the Board cannot completely ignore this factor merely because PFEL is a subsidized carrier. For PFEL proposed to operate an unsubsidized service, and "the public interest in ending" (Bd. 32). Matson's monopoly is one factor that the Board must consider in evaluating the effect of the proposal upon the broad statutory objects and policy. Cf. *McLean*, at pp. 79–88; *City of Pittsburgh* v. *Federal Power Commission*, 237 F. 2d 741, 754 (C.A.D.C.).

[10] The examiner made detailed findings as to the interlocking ownership and affiliation between Matson and the major shipping interests in Hawaii (*e.g.*, sugar, molasses, pineapple, lumber) (Rec. Dec. 7–10, J.A. 24–25). He further found that Matson carries all the sugar, molasses, and pineapple cargo bound for the United States (which represents about 95% of the cargo moving from Hawaii to the Pacific Coast) (J.A. 24). Using the statistics for the last year of record in the hearing (1954), Matson carried 98% of all Hawaii-bound cargoes, and 99% of all cargoes to the United States (J.A. 24). These findings, although essentially undisputed, were nevertheless deleted by the Board without explanation.

Contrary to the Board's sweeping claims (Bd. 12–16), the court below has not "devitalized" Section 805 (a) nor in any way suggested that the Board, under the "objects and policy" standard, cannot act to maintain "a strong domestic fleet" in the national defense and interest. The Board clearly has wide discretion to consider the many factors that may bear on the objects and policy of the Act, including the need of carriers for adequate revenue and the necessity to maintain and replace outworn vessels. The court of appeals has simply specified that the Board, in exercising its discretion, must adequately explain the basis of its judgment and must take into account all relevant factors. *Cf. American Trucking Assns.* v. *United States*, 326 U.S. 77, 86; *United States* v. *Detroit Navigation Co.*, 326 U.S. 236, 241.

CONCLUSION

The decision below is correct, there is no conflict of decisions, and this case presents no question warranting review by this Court. The petitions for writs of certiorari should be denied.

Respectfully submitted.

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JUNE 1960.

APPENDIX

Section 805(a) of the Merchant Marine Act, 1936, 46 U.S.C. 1223(a), provides as follows:

> It shall be unlawful to award or pay any subsidy to any contractor under authority of sections 1171–1182 of this title, or to charter any vessel to any person under section 1191–1206 of this title, if said contractor or charterer, or any holding company, subsidiary, affiliate, or associate of such contractor or charterer, or any officer, director, agent, or executive thereof, directly or indirectly, shall own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest, directly or indirectly in any person or concern that owns, charters, or operates any vessel or vessels in the domestic intercoastal or coastwise service, without the written permission of the Federal Maritime Board or the Secretary of Commerce. Every person, firm, or corporation having any interest in such application shall be permitted to intervene and the Board or Secretary shall give a hearing to the applicant and the intervenors. The Board or Secretary shall not grant any such application if the Board or Secretary finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this chapter: *Provided,* That if such contractor or other person above-described or a predecessor in interest was in bona-fide operation as a common carrier by water in the domestic, intercoastal, or coastwise trade in 1935 over the route

or routes or in the trade or trades for which application is made and has so operated since that time or if engaged in furnishing seasonal service only, was in bona-fide operation in 1935 during the season ordinarily covered by its operation; except in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Board or Secretary shall grant such permission without requiring further proof that public interest and convenience will be served by such operation, and without further proceedings as to the competition in such route or trade.

If such application be allowed, it shall be unlawful for any of the persons mentioned in this section to divert, directly or indirectly, any moneys, property, or other thing of value, used in foreign-trade operations, for which a subsidy is paid by the United States, into any such coastwise or intercoastal operations; and whosoever shall violate this provision shall be guilty of a misdemeanor.

Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009, provides in pertinent part:

Except so far as (1) statutes preclude prejudicial review or (2) agency action is by law committed to agency discretion:

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent juris-

diction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. * * *

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